CASE NO. 5811 CRB-3-12-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 300076557

LEE-ANN ROHMER
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: DECEMBER 23, 2013

CITY OF NEW HAVEN
EMPLOYER
SELF-INSURED

and

CIRMA
ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Christopher D. DePalma, Esq., D'Elia Gillooly DePalma, LLC, 700 State Street, Granite Square, New Haven, CT 06511.

The respondents were represented by Jason M. Dodge, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033.

This Petition for Review[1] from the November 20, 2012 Finding and Dismissal/Finding and Order of the Commissioner acting for the Third District was heard August 23, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Ernie R. Walker.

[1] We note that extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter appeals from a Finding and Dismissal/Finding and Order which was issued by the trial commissioner in regards to her claims subsequent to a 2006 compensable injury. The claimant argues that the commissioner's decision to deny temporary total disability benefits was in error, as was her decision that the claimant's disability pension must be calculated along with her earning capacity when determining an award for § 31-308a C.G.S. benefits. We have reviewed the applicable law governing these issues and find no error. Accordingly, we affirm the Finding and Dismissal/Finding and Order.

The following factual findings are pertinent to our consideration of this appeal. The trial commissioner also considered pain management issues at the formal hearing and approved the claimant's bid to have an intrathecal pump authorized; which is not an issue under appeal herein. The commissioner found the claimant had undergone a compensable injury in 2006 and had undergone two subsequent surgeries to her lumbar spine, the first on August 7, 2007, the second on May 19, 2008. The claimant's treating physician, Dr. Jonas Lieponis, ultimately assigned a 29.3% permanent partial disability to the low back and also recommended permanent work restrictions. Benefits for the complete permanent partial disability were deemed paid beginning May 28, 2009 and continuing for fifty two weeks to May 27, 2010 according to the terms and conditions of a "Reimbursement Agreement" which was signed by the parties and approved by Commissioner Charles Senich on January 12, 2010. The claimant became eligible for a disability pension from the City of New Haven in January 2009 and is receiving monthly

payments of $2,681.33 from that pension. That monthly amount translates to $618.77 per week. The parties have stipulated that the disability pension will not be offset to the extent of any workers' compensation benefits which might be paid. The claimant's average weekly wage as a police officer was $1,135.66. Her base compensation rate is $695.02. Had the claimant remained a police officer her weekly wage now would be $1,197.35.

The City has waived the disability income cap applicable to the claimant's disability pension thereby allowing her to receive a disability pension from the City and wages from outside employment concurrently with no reduction to her disability pension. The trial commissioner considered the import of various appellate decisions on the issue of disability pensions, retirement pensions and benefits under Chapter 568; i.e. Iannarone v. State/Dept. of Mental Retardation, 4138 CRB-7-99-10 (June 15, 2001), Rinaldi v. Enfield, 82 Conn. App. 505, 513 (2004), Richard Arsenault v. City of Shelton, 5679 CRB-4-11-9 (2012) and Starks v. University of Connecticut, 270 Conn. 1, 3 (2004). The commissioner noted that Iannarone held that disability pension benefits should be included as income in calculating eligibility for § 31-308a C.G.S. benefits and that Rinaldi indirectly considered this reasoning by determining that the claimant in that case should not have "regular retirement" benefits included in calculating such eligibility. The commissioner further noted that in Arsenault the Compensation Review Board held "disability retirement pensions are different from regular retirement pensions and, as such, may be treated differently in the context of § 31-308a C.G.S." Id. The commissioner noted that the Starks decision ruled that a disability pension should not be included in calculations for § 31-308a benefits, but further noted the State Employees

Retirement Act provided for a statutory offset for certain workers' compensation benefits in that case, which acted to avoid the possibility of a double recovery.

The commissioner also considered the claimant's work history after her disability retirement from the police force in 2009. She returned to school and earned a Master's degree in Marriage and Family Counseling at Southern Connecticut State University. She worked full time for approximately five months at Forensic Health Services and would have earned a salary of approximately $45,000 a year; however she was laid off due to the closure of her office due to a lack of state contracts. Her next job was at Wheeler Clinic in New Britain. She testified she had to leave that job after about four months due to the pain she was having from commuting to work and driving to see her clients. The claimant's salary at the Wheeler Clinic would have been $40,000.00 per year.

The claimant's medical treatment and disability status was also considered by the trial commissioner. On September 9, 2008 Dr. Lieponis cleared the claimant for part time light duty with no lifting bending, pushing or pulling. He also recommended she begin light duty work at 6-8 hours per week and stated it would be increased as her condition permitted. On May 28, 2009 Dr. Lieponis stated the claimant had reached maximum medical improvement. "Ms. Rohmer's' condition has plateaued…I do not anticipate any significant changes in the patient's symptoms or functional condition in the foreseeable future." Findings, ¶ 21. Dr. Lieponis further described the claimant as having a chronic pain management issue. Findings, ¶ 22. From August 12, 2009 forward Dr. Lieponis did not comment on the claimant's work capacity. The claimant continued to treat with Dr. Lieponis through November 9, 2011. Dr. Lieponis had been

recommending pain management treatment and in this last report he said her surgical condition was stable. He did not see any "…further modalities which would improve her condition from the stand point of surgical treatment." Findings, ¶ 29.

The claimant sought temporary total disability benefits from August 2, 2010 forward, based on the report of David S. Kloth, M.D., of the same date. Dr. Kloth has been treating the claimant for pain management issues. In September of 2010, Dr. Kloth performed sacroiliac joint injections and piriformis trigger point injections which did not yield benefit for the claimant. Dr. Kloth performed a surgical procedure, epidural lysis of adhesions, on January 12, 2011, in an effort to control the claimant's back pain and leg pain. The claimant experienced some decrease in her lower leg pain. He later performed a bilateral facet and sacroiliac joint mapping procedure. The claimant reported complete resolution in her leg symptoms but little change in her back pain. Dr. Kloth recommended the Claimant proceed to "…implantable techniques for treatment of her lower back." Findings, ¶ 38. On July 29, 2011 Dr. Kloth noted the claimant could not return to work as a police officer "…although I suspect that she is capable of some type of light duty, at least part time work." Findings, ¶ 36.

The trial commissioner also noted the respondent's medical examination performed by Jerrold Kaplan, M.D., Dr. Kaplan's deposition and the subsequent deposition of Dr. Kloth. The primary focus of these depositions were the alternatives these physicians offered to address the claimant's ongoing pain management issues; with Dr. Kloth recommending an intrathecal pump and Dr. Kaplan opining this treatment should be avoided.

Based on these subordinate factual findings the trial commissioner reached the following conclusions which are pertinent to this appeal.

The Claimant suffered a work injury on August 15, 2006 and was deemed to be at maximum medical improvement by Jonas Lieponis, M.D., her treating physician, on May 28, 2009. The treating physician assigned a permanent partial disability rating of 29.3% which has been paid in full. The claimant has been receiving a **disability retirement pension** (emphasis added) from the respondent/employer since January 16, 2009 in the amount of $618.27 per week.

The commissioner further concluded that "[c]onsistent with the provisions of *Rinaldi v. Enfield*, 82 Conn. App. 505 (2004), *Iannarone v. State/Department of Mental Retardation*, 4138 CRB-7-99-10 (June 15, 2001), *Starks v. University of Connecticut, et al*, 270 Conn. 1, 3 (2004) and *Richard Arsenault v City of Shelton*, 5679 CRB-4-11-9 (September 6, 2012), the Claimant's disability retirement pension should be included in calculating the amount, if any, of C.G.S. §31-308a benefits, to which she might be entitled." Conclusion, ¶ E.

The trial commissioner also concluded that the claimant had been employed subsequent to the injury and her condition had not substantially changed. She also found that pain management had not been successful and that Dr. Kloth's testimony as to the need for an intrathecal pump was more persuasive than Dr. Kaplan's testimony opposing this modality of treatment.

Therefore, the trial commissioner denied the claimant's bid for temporary total disability benefits and determined that any award for § 31-308a C.G.S. benefits must be calculated by utilizing the claimant's disability pension as well as her earnings from

employment. She approved the claimant's bid to find the intrathecal pump reasonable and necessary medical treatment for her injuries. The claimant filed a Motion to Correct the Finding and Dismissal/Finding and Order supportive of a finding that the claimant was totally disabled and clarifying issues related to her pension. The trial commissioner granted certain clarifications as to the status of the claimant's pension and denied all other substantive corrections sought by the claimant. The claimant has now pursued this appeal.

The claimant's appeal is based on two issues. First she argues that the precedent in Iannarone, supra, was overruled *"sub silentio"* by the Supreme Court in their opinion in Starks, supra. Claimant's Brief, p. 4. As the claimant views the law, neither a pension based on a disability nor a pension granted solely due to years of service can be utilized in calculating a compensation rate under § 31-308a C.G.S. The claimant also argues that Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) makes it proper for a trial commissioner to order an award of temporary total disability benefits at a point subsequent to a claimant's maximum medical improvement, and that she was now totally disabled. We are not persuaded on either issue.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is

whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The issue as to the claimant's entitlement to temporary total disability benefits is a simple one and may be addressed expeditiously. We have reviewed the holding in Marandino, supra, and it stands for two clear propositions. The claimant in that case proved to the trial commissioner's satisfaction that she was totally disabled. Id., 584-585. The claimant in that case also proved to the trial commissioner's satisfaction that although she had not previously been awarded temporary total disability benefits, her condition had deteriorated and she now was entitled to such benefits. Id., 586. The trial commissioner in this case credited evidence she found persuasive that the claimant had a work capacity and had reached a plateau in her condition. Consequently, the trial commissioner found neither of the conditions present in Marandino that enabled the commissioner in that case to award temporary total disability benefits subsequent to a date of maximum medical improvement was present. The burden is on the claimant to demonstrate he or she is entitled to temporary total disability benefits. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). The probative evidence herein, which included opinions from treating physicians,[2] that the claimant had a work

[2] In considering matters as to whether a claimant is totally disabled, "[w]e have consistently held it is the claimant's burden to establish total disability" see Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001); Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009); Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007) and Gombas v. Custom Air Systems, Inc., 4996 CRB-4-05-9 (September 20, 2006). This determination is a factual matter where we

capacity, convinced the trial commissioner that the claimant did not prove her case. We cannot reverse such a decision on appeal.

Our analysis of the other issue under appeal is framed by the analysis we performed last year in the Arsenault decision. In that decision, we determined the facts of that case were governed by the precedent in Rinaldi, supra, and not Iannarone, supra. We cited this language from Rinaldi, "Iannarone is distinguishable from the present case, however, because the plaintiff is receiving a retirement pension, rather than a disability pension." Id., at 513. The court essentially concurred with this board's analysis that a retirement pension 'neither reflects the claimant's earning capacity, nor does it constitute an attempt by an employer to compensate a claimant for his inability to continue earning wages due to an injury. Instead, it is payable pursuant to a separate contractual provision that is wholly unrelated to the amount a claimant is currently able to earn.' Id., at 512, *quoting* Rinaldi v. Enfield, 4459 CRB-1-01-11 (December 27, 2002), *aff'd*, 82 Conn. App. 505 (2004). The court concluded that "disability retirement pensions are different from regular retirement pensions and, as such, may be treated differently in the context of § 31-308a. Id., at 514." Arsenault, supra.

The claimant in Arsenault was receiving a pension based on his years of service to the police force, and it was not calculated based on his disability. We determined that therefore the trial commissioner properly relied on Rinaldi to find, that while the claimant may have had a disability, that the claimant chose to exercise his right to receive a

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must uphold the trial commissioner's decision unless it is "clearly erroneous" Franklin v. State/Dept. of Mental Health & Addiction Services, 5224 CRB-8-07-4 (April 11, 2008).

pension based on non-disability eligibility. Having chosen to do so, there was no issue of a double recovery as the claimant's retirement income was not based on whether he was disabled.

In the present case, there is no question that the claimant's pension is based on the fact that she is disabled from her previous job as a police officer; and was not provided pursuant to an ordinary retirement based on years of service. The trial commissioner in the present case clearly could find Iannarone on point. In Iannarone, we pointed out that the claimant in that case was seeking § 31-308a C.G.S. benefits and "the wage replacement benefits sought here by the claimant are meant to replenish a former income source (his job with the state) that is already being replenished in part by a pension from that same entity." Id. That is the case herein.

A review of Starks, cited herein, does not suggest to us that it was intended to overrule prior precedent on the issue of calculating disability retirement and § 31-308a C.G.S. benefits. The Supreme Court noted that the State Employees Retirement Act provided for a statutory offset against any possible double recovery to the claimant. Starks v. State/University of Connecticut, 4467 CRB-2-02-12 (February 13, 2003), *rev'd*, 270 Conn. 1, 3 (2004). The court cited Iannarone at length in their decision in Starks, id., 11-14, but expressed no skepticism as to the rationale of that decision based on the facts presented in that case. Rather, in Starks, the court focused on the plaintiff's argument that the state disability pension the claimant received in that case should not be deemed "earnings," id., 14, in part as the statute precluded any double recovery. Id., 20-31. The claimant in this case is not receiving a pension pursuant to the State Employees

Retirement Act. We decline to extend the holding in Starks to pensions not governed by that act.[3]

We note that the Appellate Court reaffirmed the strong public policy against double recovery from disability benefits in McFarland v. Dept. of Development Services, 115 Conn. App. 306, 313-314 (2009). In the absence of a specific statutory offset available to the claimant against her disability pension, we cannot approve a calculation of § 31-308a C.G.S. benefits that does not take into account the claimant's disability pension.[4]

We find no error and affirm the Finding and Dismissal/Finding and Order.[5]

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[3] The claimant does not cite, and our research did not find, any precedent applying Starks v. University of Connecticut, 270 Conn. 1 (2004) in a manner acting to derogate or limit Iannarone v. State/Dept. of Mental Retardation, 4138 CRB-7-99-10 (June 15, 2001). Indeed cases such as Pizzuto v. Dept. of Mental Retardation, 283 Conn. 257 (2007) citing Starks, supra, specifically note the question at bar "has no bearing on the issue before us in the present case." Pizzuto, supra, at 264. As a result we believe that we must extend *stare decisis* to our holding in Iannarone, supra. "In Mitchell v. J.B. Retail Inventory Specialists, 3458 CRB-2-96-10 (March 31, 1998) fn. 1, we held Stare decisis, although not an end in itself, serves the important function of preserving stability and certainty in the law. Accordingly, 'a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. Maltbie, Conn. App. Proc., p. 226.' Herald Publishing Co. v. Bill, 142 Conn. 53, 62 (1955)." Chambers v. General Dynamics Corp./Electric Boat Division, 4952 CRB-8-05-6 (June 7, 2006), *aff'd*, 283 Conn. 840 (2007). We have not been presented with that sort of "inescapable logic" that necessitates overruling Iannarone, supra.

[4] The claimant argues that the defendant's collective bargaining agreement with the claimant constitutes a "waiver" of any defense to any alleged "double recovery" from a disability pension and the claimant's subsequent employment earnings. Claimant's Brief, pp. 9-12. We disagree. First, we find the issue of waiver is essentially an issue of fact, see (L & R Realty v. Connecticut National Bank, 246 Conn. 1, 8 (1998)) where the trial commissioner resolved this issue in a manner adverse to the claimant. The commissioner was not obligated to find a waiver on another issue bound the respondents on the issue herein. We may not second-guess this determination on appeal. In addition, we have long held that collective bargaining agreements may not supersede the provisions of Chapter 568. See Boulay v. Waterbury, 9 Conn. Workers' Comp. Rev. Op. 111, 941 CRD-5-89-11 (April 8, 1991), *aff'd,* 27 Conn. App. 483 (1992) and Morales v. Bridgeport, 5750 CRB-4-12-5 (April 29, 2013).

[5] We find no error from the trial commissioner's denial of those corrections she denied in the claimant's Motion to Correct. A trial commissioner is not obligated to grant those corrections that continue a litigant's position as to the law and the facts, Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) and D'Amico

Commissioners Peter C. Mlynarczyk and Ernie R. Walker concur in this opinion.

v. Dept. of Correction, 4287 CRB-5-00-9 (August 3, 2001), *aff'd*, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).